IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIELLE CECCHANECCHIO	)	
	)	Civil Action
v.	)	
	)	No. 00-4925
CONTINENTAL CASUALTY COMPANY	)	

MEMORANDUM

Padova, J. **November , 2001**

The instant matter arises on Plaintiff's and Defendant's Cross-Motions for Summary Judgment. For the reasons that follow, the Court grants partial summary judgment in favor of the Plaintiff as to the pre-existing condition issue.[1] Defendant's Motion is denied.

I. Background

The facts in this case are largely undisputed.[2] Plaintiff Danielle Cecchanecchio worked as a pharmacist for the Kmart Corporation beginning in July of 1994. In 1997, Plaintiff elected to enroll in Kmart's Long-term Disability Insurance Plan ("Plan"). The Plan is administered and operated by Defendant Continental Casualty Company. Plaintiff applied for enrollment in the long-

[1]Pursuant to the agreement of counsel, the Court's opinion reaches only the issue of Defendant's application of the pre-existing condition exclusion, and does not here reach the issues of rescission or total disability.

[2]The parties submitted a stipulation specifying those facts to which the parties agreed. Except where otherwise noted, the facts recited herein are those to which the parties have stipulated.

term disability Plan on March 18, 1997. Defendant approved the enrollment application on April 22, 1997, with an effective date of coverage of May 1, 1997.

The Plan contained an exclusion for a "Pre-existing Condition." (Adm. Rec. at CCC00023 ("The Plan" at 7).) According to the Plan, a pre-existing condition:

> means a condition for which medical treatment or advice was rendered, prescribed or recommended within 6 months prior to the Insured Employee's effective date of insurance. A condition shall no longer be considered pre-existing if it causes loss which begins after the employee has been insured under this policy for a period of 12 consecutive months.

(The Plan at 4.) The six-month pre-existing condition period ran from November 1, 1996 through May 1, 1997.

On April 14, 1997, prior to the expiration of the pre-existing condition period, Plaintiff visited Dr. Jack Jenofsky, her gynecologist, with complaints of urinary frequency and urgency. Dr. Jenofsky ordered a urinalysis and PAP smear, with plans for her to consult with a urologist if the studies were negative. The urinalysis results were negative. (Pl.'s Mot. for Summ. Judgment ¶ 16; Def.'s Proposed Findings of Fact ¶ 39.) The PAP smear indicated "moderate/marked acute inflammation." (Def.'s Proposed Findings of Fact ¶ 35.) In August 1997, Plaintiff sought treatment from a urologist, Dr. Louis Keeler. (Pl.'s Mot. ¶ 18; Id. ¶ 39.) Plaintiff was then diagnosed with a severe and acute urinary condition known as interstitial cystitis, in August or September

1997. (Pl.'s Mot. ¶ 19; Def.'s Proposed Findings of Fact ¶ 39.) Plaintiff filed for and received benefits pursuant to her short-term disability coverage.[3] Plaintiff stopped working as a pharmacist and took on a light duty position in the Kmart pharmacy. (Pl.'s Mot. ¶ 24.) Plaintiff subsequently filed for long-term disability benefits. Defendant denied the long-term disability claim on the basis that her interstitial cystitis was a pre-existing condition and therefore excluded under the Plan. (Pl.'s Mot. ¶ 29; Def.'s Proposed Findings of Fact ¶ 43.) In the instant action, Plaintiff seeks unpaid long-term disability benefits to which she claims she is entitled. (See Amended Compl.)

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is

[3]Neither party presents any evidence relating to the short-term disability coverage, which is not a subject of this action. Defendant notes, however, that short term disability benefits are provided "under an entirely different program . . . which program upon information and belief does not contain a preexisting condition limitation). (Def.'s Mem. at unnumbered page 9.)

"material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court

cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

Where, as here, cross-motions for summary judgment have been presented, we must consider each party's motion individually. Each side bears the burden of establishing a lack of genuine issues of material fact. Reinert v. Giorgio Foods, Inc., 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998).

III. Discussion

A. Heightened Arbitrary and Capricious Standard of Review

A denial of benefits under § 1132(a)(1)(B) ordinarily is reviewed under a de novo standard. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989). However, "ERISA mandates that [the reviewing Court] apply a deferential 'arbitrary and capricious' standard of review to benefits decisions when plan administrators are given discretionary authority to interpret the terms of the plan." Reinert, 15 F. Supp. 2d at 596 (citing Abnathya v. Hoffman-LaRoche, Inc., 2 F.3d 40, 44-45 (3d Cir. 1993)); see also Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In this case, there is no dispute that the plan grants discretion:

> The Company shall have discretionary authority to interpret, construe and determine the application of the Plan and its terms and to resolve all issues arising under the Plan. This discretionary authority shall

> include the authority to (1) construe disputed or doubtful terms or of any rule, regulation, form or procedure, (2) determine the eligibility of an individual to participate in the Plan, (3) determine the amount, if any, of benefits to which any Participant, spouse, beneficiary, Covered Dependent or other person may be entitled under the Plan, (4) determine the timing and manner of payment of benefits, (5) determine any matter relating to the administration of the Plan or any claim under the Plan, and (6) resolve all other issues arising under the Plan, any such determination to be final and binding upon all persons.

(Def. Mot. Ex. B, Art. IV.D ("The Policy").) The "arbitrary and capricious" standard is essentially the same as the "abuse of discretion" standard. Abnathya, 2 F.3d at 45 n.4. Under this standard, "the district court may overturn a decision of the Plan administrator only if it is 'without reason, unsupported by the evidence or erroneous as a matter of law.'" Abnathya, 2 F.3d at 45 (quoting Adamo v. Anchor Hocking Corp., 720 F. Supp. 491, 500 (W.D. Pa. 1989)). "This scope of review is narrow, and 'the court is not free to substitute its own judgment for that of the [administrator] in determining eligibility for plan benefits.'" Id. (quoting Lucash v. Strick Corp., 602 F. Supp. 430, 434 (E.D. Pa. 1984)).

Where an insurance company both determines eligibility for benefits and pays benefits out of its own funds, however, the standard of review is "heightened" arbitrary and capricious review. Pinto v. Reliance Std. Life Ins. Co., 214 F.3d 377, 378 (3d Cir. 2000). This modified standard recognizes that when an insurance company both funds and administers benefits, it is "generally acting under a conflict" that warrants the heightened form of

review. Pinto, 214 F.3d at 378. Under this "heightened" approach, the courts apply a "sliding scale" approach that integrates the conflict as a factor in applying the arbitrary and capricious standard. Pinto, 214 F.3d at 393. Courts must consider the nature and degree of apparent conflicts with a view to shaping their arbitrary and capricious review of the benefits determinations of discretionary decisionmakers. Id. Factors a court may take into account in determining the appropriate degree of deference include: "the sophistication of the parties, the information accessible to the parties, . . . the exact financial arrangement between the insurer and the company [and] the current status of the fiduciary." Id. at 392. The degree of review increases in proportion to the intensity of the conflict. Friess v. Reliance Standard Life Ins. Co., 122 F. Supp. 2d 566, 572 (E.D. Pa. 2000). Though a court may not look outside the administrative record when reviewing an administrator's decision, a court may consider evidence outside the record to evaluate the level of an administrator's conflict of interest and to determine the appropriate standard of review. Dorsey v. Provident Life & Accident Ins. Co., Civil Action No. 01-1072, 2001 U.S. Dist. LEXIS 16353, at *8 (E.D. Pa. Oct. 5, 2001). Evidence of significant conflict of interest places a case at the far end of the sliding scale, under which the court reviews the administrator's decision with a "high degree of skepticism." Pinto, 214 F.3d at 395.

Evidence of procedural anomalies warrant application of more weight to the conflict along the sliding scale under the "heightened" abuse of discretion standard. For example, in Pinto, the Court of Appeals for the Third Circuit found various procedural anomalies, such as the fact that the insurance company reversed its initial decision to award benefits and ignored a staff worker's recommendation to reinstate benefits. Pinto, 214 F.3d at 393-94. Additionally, the Pinto court noted that the insurer relied on a doctor's specific limitations to reject the claim while at the same time ignoring the doctor's diagnosis of disability. Id. In Dorsey v. Provident Life Ins. Co., Civil Action No. 01-1072, 2001 U.S. Dist. LEXIS 16354 (E.D. Pa. Oct. 5, 2001), Judge Marvin Katz noted that in handling the initial claim and the appeal, the same doctor performed the medical review at the initial review and the appellate review stages. Dorsey, 2001 U.S. Dist. LEXIS at 16354, at *19-20. In addition, the appeals consultant responsible for the appeal could not independently reverse the denial of benefits. Id. at *20. Judge Katz concluded that these aspects of the defendant's process constituted evidence of significant conflict of interest, thus allowing the court to view the decision with a "high degree of skepticism." Id. ("These procedural anomalies indicate a less-than-partial appeal process designed to make it more difficult for an appellant to succeed.")

In this case, Defendant denied the claim on the basis of the pre-existing condition exclusion in the Plan. Plaintiff argues that Defendant's application of the pre-existing condition exclusion lacked any support in the administrative record. In particular, Plaintiff notes the lack of any medical opinion linking Plaintiff's symptoms from the April 1997 gynecological visit to the interstitial cystitis that was later diagnosed in August or September 1997 by the urologist. Plaintiff contends that this lack of medical evidence is an indicator that there was a strong conflict of interest guiding the administrative decision.

Defendant based its initial denial of Plaintiff's claim for long-term disability benefits on the medical records from Dr. Jenofsky. (Adm. Rec. at CCC00065 ("Denial Letter Dated April 20, 1998") ("We have obtained your medical records from Dr. Jenofsky. You were seen for complaints of urinary frequency and urgency on 4/14/97. You were treated for your condition within 11/1/96 and 4/30/97. . . . Since we have obtained documented treatment within the pre-existing periods, we are unable to honor your claim for benefits.")) Defendant subsequently denied Plaintiff's appeal of the denial decision, noting the following:

> The medical records of Dr. Jenofsky clearly document treatment and advice was rendered for complaints of "urinary frequency and urgency and also nocturia times four for the past year" during Ms. Ceccanecchio's visit on 4/14/97. Furthermore Dr. Jenofsky's notes reflect that "Urine was obtained for urinalysis and culture sensitivity. The patient was also advised to see an Urologist if the studies are negative and also to see a

> Dermatologist regarding her rash on her chest." Additionally, Ms. Ceccanecchio cited the reason for her visit, written on Dr. Jenofsky's Medical History Update form, was to consult about problems with her "BLADDER."

(Adm. Rec. at CCC00041 ("Letter from Nathan S. Rudgers to Timothy R. Hough, Esq. dated August 28, 1998.").)

The parties do not dispute that Plaintiff was not diagnosed with interstitial cystitis by Dr. Jenofsky. Plaintiff was eventually diagnosed in August or September 1997 by a urologist, some four or five months after the gynecological visit at which she complained of some bladder problems. The fact that Plaintiff was not actually diagnosed with the condition until after the conclusion of the pre-existing condition is not controlling in the determination of whether Plaintiff's condition was pre-existing, because the policy is unambiguous that a rendering of diagnosis during the pre-existing condition period is not required.[4] See Cury v. The Colonial Life Ins. Co. of Am., 737 F. Supp. 847, 854 (E.D. Pa. 1990).

The fact that a specific diagnosis may not be required, however, does not also mean that there need not be a linkage between the symptoms for which Plaintiff sought advice or treatment and the interstitial cystitis that was diagnosed several months later. In Cury, for example, although the plaintiff was not

[4]In analyzing ERISA-plan language, courts employ ordinary principles of contract construction. See Taylor v. Continental Group, 933 F.2d 1227 (3d Cir. 1991).

diagnosed with multiple sclerosis until some time after the appearance of her symptoms, the case involved a consistent string of doctors' consultations and treatment to reach a diagnosis. Cory, 737 F. Supp. at 851-53. Plaintiff did not challenge that the pre-diagnosis symptoms which were treated were not connected to the disease that was ultimately diagnosed. On de novo review, the Cory court concluded that the record in the case "clearly demonstrates that multiple sclerosis manifested itself in plaintiff prior to and during the pre-existing condition period."[5] Id. at 855.

In the instant case, Plaintiff received medical consultation and advice from Dr. Jenofsky for complaints of urinary frequency and urgency on April 14, 1997. However, the critical issue faced by Defendant with respect to the application of the pre-existing condition exclusion was whether Plaintiff's urinary symptoms on April 14, 1997 were caused by the disabling condition of interstitial cystitis first diagnosed and treated by Dr. Keeler in August and September of 1997. Defendant applied the pre-existing condition clause and denied Plaintiff's long-term benefits claim, even though there was a medical opinion regarding uncertainty as to

[5]Similarly, the link between the treatment and the diagnosed condition was not at issue in Reinert, in which the court upheld the Defendant's application of a pre-existing condition provision. In that case, Defendant denied Plaintiff's claim for treatment of foot ulcers after conducting an internal audit of her medical records and discovering that the plaintiff had a medical history of diabetic foot ulcers. Reinert, 15 F. Supp. 2d at 592.

when the interstitial cystitis began.[6] In light of the complexity of the diagnosis issues in this case, the Court views Defendant's decisionmaking process, in which Defendant did not obtain a medical review from a competent urologist, as procedurally irregular.[7] Such claims handling is curious, deviates from reasonable conduct under these circumstances, and leads to speculative conclusions regarding difficult causation issues. The Court recognizes that the procedural anomalies involved here may not reach the same level as those present in Pinto or Dorsey. Nevertheless, the Court regards Defendant's procedure, in the context of the record before it, to be so irregular and unreliable as to add more weight to Defendant's conflict along the sliding scale. For these reasons, the Court deems it appropriate to apply a heightened arbitrary and capricious standard, and will view Defendant's determination with a degree of skepticism in the middle of the sliding scale.

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[6]Plaintiff submitted a letter by Dr. Philip M. Hanno of the Urology Department at Temple University, which stated that, "Her diagnosis was not made until later August of 1997 and with a disease like this which is manifested by an exaggeration of normal behavior and normal sensation, one cannot say for certain what date it began." (Pl. Ex. C ("Letter by Dr. Hanno").)

[7]Defendant does point to claim activity notes made by the nurse case manager. (Def.'s Supp. at 2. (referring to CCC00067).) These notes, however, shed no light on the determination of when the interstitial cystitis set in or whether the pre-coverage symptoms resulted from such interstitial cystitis.

B. Review of Plaintiff's Claim

In applying the heightened arbitrary and capricious standard, the Court limits its review of the decision to the evidence in the administrative record that was before the administrator at the time of the benefit denial. Dorsey, 2001 U.S. Dist. LEXIS 16354, at *21-22 (citing Mitchell v. Eastman Kodak Co., 113 F.3d 433, 440(3d Cir. 1997)). Under the heightened review standard, the Court determines that Defendant's application of the pre-existing condition exclusion was an abuse of discretion under the Plan.

As explained above, the critical issue faced by Defendant with respect to the application of the pre-existing condition exclusion was whether Plaintiff's urinary symptoms on April 14, 1997 were caused by the disabling condition of interstitial cystitis first diagnosed and treated by Dr. Keeler in August and September of 1997.[8] Plaintiff complained during her April 1997 doctor's visit

[8]Defendant disagrees that the policy language requires any such link, and argues that the use of the term "condition" means that any urinary symptoms, even if completely unrelated to the later-diagnosed interstitial cystitis, would constitute a "pre-existing condition" under the terms of the policy. In this case, the administrator also had discretion to interpret provisions of the plan, and therefore these interpretations are also reviewed under the arbitrary and capricious standard of review. Under such review, a court must uphold an administrator's interpretation of the plan, even if it disagrees with it, so long as "the administrator's interpretation is rationally related to a valid plan purpose and is not contrary to the plain language of the plan." Dewitt v. Penn-Del Directory Co., 106 F.3d 514, 520 (3d Cir. 1997). Under the standard, "a court may not disturb a fiduciary's interpretation of the plan so long as it is reasonable. Keating v. Whitmore Mfg. Co., No. 97-4463, 1998 WL 372457, at *1 (E.D. Pa. June 4, 1998).

of symptoms consisting of urinary frequency and urgency. Although these complaints may be regarded in the lay sense as similar to the August and September 1997 complaints which eventually resulted in a diagnosis of interstitial cystitis, urinary frequency and urgency do come in many varieties and can result from many causes. A determination that the urinary frequency and urgency experienced by Plaintiff in April of 1997 was caused by interstitial cystitis, first diagnosed and treated in August or September 1997, is a medical conclusion which ordinarily must rest on medical opinion.

In making its decision, Defendant relied upon the medical record and various unspecified "interviews" with the Plaintiff and doctors. The medical record in this case lacked any medical opinion establishing a medical connection between the April 1997 symptoms and the subsequently diagnosed interstitial cystitis. The only expert opinion even touching upon the possible relationship between the April symptoms and the eventual interstitial cystitis

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In this case, Defendant's argument would mean that any symptoms relating to Plaintiff's bladder, even if totally unrelated to the condition that was the basis of her disability claim, would constitute a pre-existing condition. In the Court's view, this is an unreasonable interpretation that is incorrect as a matter of law. For example, suppose a claimant suffered from head pain during the pre-existing condition period. Five months after the policy is issued, a brain tumor is diagnosed. The claimant asserts a long-term disability claim based on the condition of metastatic brain tumor. The headaches would not, in the Court's view, be a pre-existing condition without a showing of a nexus between the headaches and the brain tumor.

was the letter from Dr. Hanno, who explained the difficulty in drawing such a causal connection.[9] Dr. Hanno opined:

> Danielle Caccenecchio [sic] spoke with me today, April 10, 1998, and asked me to send you a note. E [sic] been treating her for interstitial cystitis and she is currently on her third month of Elmiron. Often it takes this medication six months or more to start showing substantial efficacy. It is unclear whether [sic] her symptoms of interstitial cystitis began. Her diagnosis was not made until later August of 1997 and with a disease like this which is manifested by an exaggeration of normal behavior and normal sensation, one cannot say for certain what date it began.

("Letter from Dr. Hanno.") Moreover, the administrative record does not reflect the utilization by Defendant of an independent medical review or other expert opinion in order to establish this connection. Although the record reflects notes made by a nurse case manager who reviewed the medical records, the notes sheds no light on the critical issue of determining when the interstitial cystitis set in or whether the pre-coverage symptoms resulted from interstitial cystitis. Thus, the administrative record provides a lack of evidence to support Defendant's decision. In light of the evidence that was before Defendant, the Court views Defendant's application of the pre-existing condition exclusion and the denial of Plaintiff's long-term disability claim on that basis to be an

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[9]The letter was dated April 10, 1998, which was prior to the date of the initial denial of Plaintiff's claim. It is unclear whether this letter was received and considered by Defendant prior to the initial determination denying the claim. However, the letter was considered in the denial of Plaintiff's appeal. (Adm. Rec. at CCC00040 ("Our review also included the information submitted from Dr. Hanno dated 4/10/98.").)

abuse of discretion under heightened arbitrary and capricious review.[10]

IV. Conclusion

In accordance with the above reasoning and conclusions, the Court grants partial summary judgment in favor of Plaintiff on the issue of the pre-existing condition exclusion. The Court further denies Defendant's Motion for Summary Judgment. An appropriate Order follows.

[10]The Court further concludes that even under the ordinary arbitrary and capricious standard, Defendant's decision was an abuse of discretion. Defendant's determination of the key issue – that Plaintiff's April 1997 symptoms were the result of her later-diagnosed interstitial cystitis – was unsupported by the medical evidence contained in the administrative record.

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ORDER

AND NOW, this day of November, 2001, upon consideration of Plaintiff's Motion for Summary Judgment (Doc. No. 20), Defendant's Motion for Summary Judgment (Doc. No. 23), and all attendant and responsive briefing, **IT IS HEREBY ORDERED** that Plaintiff's Motion is **GRANTED** on the issue of pre-existing condition.[1] **IT IS FURTHER ORDERED** that Defendant's Motion is **DENIED**. Partial judgment is **ENTERED** in favor of the Plaintiff and against Defendant on the pre-existing condition issue.

BY THE COURT:

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John R. Padova, J.

[1]This Court's ruling does not reach the issues of total disability or policy rescission.